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UNIQUE DIMENSION SDN BHD

v.

SECURE PARKING CORPORATION SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
SITI KHADIJAH S HASSAN BADJENID JC
[SUIT NO: S-22-1208-2004]
30 APRIL 2013

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LAND LAW: *Lease - Non-registration - Parties entered lease agreement to operate car park - Option to renew lease agreement for further five years upon expiry of first five years term - Whether non-registration rendered lease agreement invalid against new owner of property - Whether new owner entitled to claim damages for lessee's failure to quit premises as demanded*

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The defendant, a car park operator, had a five-year lease agreement with the owner ('TALA') of a building to operate a car park within the premises. In consideration for the defendant investing a substantial amount of money to develop the car park, the parties agreed that the defendant had the option to renew the lease agreement for a further five

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years upon expiry of the first five-year term. When TALA defaulted in its obligations under a charge to which the building was subject, Danaharta National acquired the rights over the premises and then sold the building to the plaintiff. The plaintiff gave the defendant a month's notice to vacate the building but the defendant only handed over vacant possession on expiry of the extended five-year term of the lease. In the

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instant action, the plaintiff sought a declaration that the lease agreement and/or extension thereof was void *ab initio* and unenforceable and claimed damages for loss of profits for being denied the use of the car park area as a result of the defendant's failure to vacate the premises as demanded.

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Held (dismissing claim):

(1) The defendant's continued occupation of the property was based on a valid lease agreement. Although TALA by its agreement failed to effectively create a registered lease as required by the National Land

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Code, the non-registration did not render the lease agreement ineffective. The agreement between TALA and the defendant created a valid and binding contract deserving full recognition in law, and the defendant, being the aggrieved party, deserved the protection of equity. (paras 25 & 35)

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(2) The plaintiff failed to prove the invalidity of the lease agreement and the fact remained that the defendant had been paying rentals for occupation of the premises to TALA and later to TALA's receivers and managers and/or liquidators on behalf of Danaharta Hartanah. The plaintiff did not object to the production of the proof of payments of rental made by the defendant. The plaintiff failed to show the defendant's wrong upon which the plaintiff could rely on as the cause of its loss of profits and the basis of its claim for general damages. (para 31)

(3) The plaintiff failed to prove that it was entitled to the damages claimed. It was not sufficient for the plaintiff to claim that because the defendant occupied the premises, it was entitled to damages. The plaintiff had to prove on balance of probabilities that it could have operated a car park business and the income it could have derived from it. (paras 31 & 35)

Case(s) referred to:

Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan [2003] 4 CLJ 785 CA ***(refd)***

Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***

Chong Swee Huat & Anor v. Lim Shian Ghee T/A L & G Consultants & Education Services [2009] 4 CLJ 113 CA ***(refd)***

Czarnikow Ltd v. Koufos (The Heron II) [1969] 1 AC 350 ***(refd)***

Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***

Ismail v. Haji Taib [1972] 1 LNS 185 FC ***(refd)***

Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 HC ***(refd)***

Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Margaret Chua v. Ho Swee Kiew & Ors [1961] 1 LNS 61 HC ***(refd)***

P Narayanan s/o Koran v. Pentadbir Tanah Daerah Johor Bahru [1996] 1 LNS 476 HC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor [2012] 3 CLJ 450 CA ***(refd)***

Siew Soon Wah & Ors v. Yong Tong Hong [1973] 1 LNS 137 PC ***(refd)***

For the plaintiff - Sivapakiam Krishnan (Asnida Alias with her); M/s Othman Hashim & Co

For the defendant - Andrew Teh (Sara Anthony with him); M/s Wong Lu Peen & Tunku Alina

Reported by Ashok Kumar

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JUDGMENT

Siti Khadijah S Hassan Badjenid JC:

[1] The facts in this case can be summarised as follows: Tala (M) Sdn Bhd which is a company in liquidation and receivership (herein
B referred to as TALA) is the registered proprietor of a building known as Plaza Prima. Based on a lease agreement dated 17 May 1999 (to be referred to as the lease agreement) with TALA, the defendant, a car park operator, had since 1 June 1999 been occupying the car park within Plaza Prima which has 447 parking bays (herein referred to as
C 'the car park') and an office space at the said building situated at Lot 2 & 4, 4 1/2 Mile, Jalan Kelang Lama, 58200 Kuala Lumpur (together to be known as 'the premises').

[2] By way of a sale and purchase agreement dated 25 September
D 2002 (to be known as the first agreement) TALA had vested with Pengurusan Danaharta National Berhad (herein referred to as Danaharta National) and Danaharta Hartanah Sdn Bhd (to be referred to as Danaharta Hartanah) involving the said premises. Subsequently *vide* a sale and purchase agreement dated 18 February 2003 (second agreement) Danaharta Hartanah had sold the premises to the plaintiff for
E a purchase price of RM6.2 million and after full payment of the purchase price by the plaintiff, on 1 July 2004 the deed of assignment between Danaharta Hartanah and the plaintiff was executed transferring all rights, interest and title of the premises to the plaintiff.

F **[3]** Upon completion of the second agreement the plaintiff's solicitors had *vide* a letter dated 3 June 2004 gave one month notice to the defendant to vacate the said premises. By another letter dated 18 June 2004 the plaintiff gave a further extension of another one month till 31 July 2004 for the defendant to vacate the premises and to surrender
G vacant possession of the same to the plaintiff. In the mean time a search by the defendant at the Wilayah Land Office revealed that TALA was the registered owner and defendant had repeatedly requested for proof of ownership from the plaintiff to which the plaintiff did not respond. The defendant had only returned vacant possession of the said premises to the plaintiff upon expiry of the lease agreement on 31 May 2009.

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[4] According to the plaintiff the defendant's failure to deliver vacant possession from the date of completion of the second agreement has caused him loss and damages hence this lawsuit against the defendant which was filed by the plaintiff on 11 August 2004 claiming vacant
I possession of the said premises. The plaintiff is now asking from this

court a declaration that the lease agreement and/or any extension thereto in respect of the parking lots be declared invalid or void *ab initio* and/or unenforceable by the defendant against the plaintiff. The plaintiff is also asking for damages to be determined for the loss of profit from date of completion of the second agreement, ie, from 21 May 2004 until 31 May 2009 together with interest therein.

[5] It is submitted by learned counsel for the plaintiff that since the second agreement is valid and enforceable pursuant to established principles of law, the plaintiff being the aggrieved party should and ought to be allowed the relief that they have sought against the defendant as they have been deprived the right of usage and/or right of enjoyment of the property that they have acquired for valuable consideration.

[6] Issues

(a) Whether the plaintiff is the registered proprietor of the property in question?;

(b) Whether the defendant continued occupation of the property in question based on the lease agreement was valid?; and

(c) On the issue of damages suffered by the plaintiff.

Whether The Plaintiff Is The Registered Proprietor Of The Property In Question?

[7] It is undisputed that the premises are held under a master title and no individual titles to the premises have been issued. Under the Master Title TALA has all along been the registered proprietor of Plaza Prima.

[8] By way of the first agreement TALA had vested with Danaharta National and Danaharta Hartanah involving the said premises. It was when TALA had defaulted in its obligation under a charge created in favour of MBF Finance that Danaharta National had acquired all of MBF Finance Berhad's rights, including its rights over the premises. The property was sold by Danaharta National to Danaharta Hartanah subject to any and all encumbrances on or against the property and/or any agreement that may have been entered into with or in favour of TALA and on an as is where is basis.

[9] It is also undisputed that *vide* the second agreement Danaharta Hartanah had sold the premises to the plaintiff for a purchase price of RM6.2 million and the plaintiff had made full payments for the purchase

of the same. Since there is no title to the premises in question, the transmission of rights, interest and title of the premises to the plaintiff was done by way of an assignment through the deed of assignment dated 1 July 2004 enabling the plaintiff to inherit the premises as its beneficial owner on 1 July 2004.

[10] Clause 4 of the deed of assignment states as follows:

> Rights, title and interests in the Property
>
> HARTANAH expressly agrees and confirms that from the date of this Assignment, HARTANAH shall have no right, title, interest, claim or demand whatsoever under the PRINCIPAL AGREEMENT or any provision therein and in and to the PROPERTY or any part thereof and shall make no claim whatsoever in respect thereof and HARTANAH acknowledges that from the date of this Assignment, the PURCHASER is the person entitled to the rights, title, interests and benefits under the PRINCIPAL AGREEMENT and to the legal and equitable title and interest in and to the PROPERTY.

[11] Learned counsel for the plaintiff submitted that by interpreting the terms and condition narrated in the said second agreement which had been successfully finalised between the contracting parties, the court should conclude that the plaintiff is not a stranger to the contract but rather a *bona fide* purchaser for valuable consideration. It was further submitted that the plaintiff should be allowed to rely on the terms and conditions and its annexes to the second agreement which clearly identify the rights of the contracting parties.

[12] According to learned counsel for the plaintiff the fact that the plaintiff had complied with the terms and conditions of the second agreement and had fully paid the price of the premises the plaintiff has acquired the beneficial ownership of the said property pending the registration of the ownership of the title deed.

[13] It is obvious to the court that there is no dispute as to the plaintiff's averments in regard to this issue and the defendant without the slightest doubt has full heartedly agreed that the plaintiff became the owner of the premises not by way of registration but by way of assignment on the assignment date, ie, on 1 July 2004. As to whether the plaintiff is the registered proprietor of the property in question, from the evidence adduced thus far, the answer by this court to that issue obviously cannot be anything else other than 'no' pending registration of the ownership of the property.

Whether The Defendant's Continued Occupation Of The Property In Question Based On The Lease Agreement Was Valid?

[14] The lease agreement was formally signed between the defendant and TALA and was officially stamped. According to the defendant in consideration of his investment on the development of the car park it was agreed as a term of the lease agreement that he be given a lease of the premises for an initial period of five years with an automatic renewal of the lease for another five years at his option by issuing a notice of not less than 30 days before the expiry of the original tenure of the lease.

[15] One of the expressed terms of the lease agreement was that the said lease agreement was binding on all successors in title and assignee of TALA. On 30 April 2004, the defendant exercised the option under the lease agreement to extend the lease for a further five years commencing 1 June 2004. The said letter was addressed to the then receiver and manager of TALA one Mr. Narendra Kumar from the chartered accounting firm of Shamsir Jasmir Thornton. All payments of rent were made to TALA and later to TALA's receiver and manager and/or liquidator.

[16] By its letter of 26 July 2004 Danaharta Hartanah wrote to the defendant and explained that the premises in question were sold by Danaharta National to Danaharta Hartanah and subsequently to the plaintiff. Danaharta National also confirmed that TALA had from 18 February 2003 to 31 May 2004 been collecting rent from the defendant as the duly authorised agent for Danaharta Hartanah.

[17] According to the defendant by this letter Danaharta National had acknowledged the lease agreement between TALA and the defendant and confirmed receipt of rent which was collected by TALA as an agent for Danaharta Hartanah. As such on this point alone the plaintiff is estopped from claiming that the lease was invalid and/or unenforceable.

[18] PW1 had testified that when the plaintiff signed the second agreement to purchase the premises they had knowledge of the defendant's actual occupation of the premises. It is also undisputed that a search on the master title at the land office disclosed the caveat lodged by the defendant declaring the defendant's interest on the premises.

[19] Learned counsel for the defendant pointed out the fact that the lease was not registered did not automatically invalidate the lease. He cited the case of *Margaret Chua v. Ho Swee Kiew & Ors* [1961] 1 LNS 61 to support his contention in which case the High Court in Penang in its decision stated as follows:

A The Judge, however, was of the opinion, and again I agree with him, that although the agreement might be a nullity as a lease it could be, and indeed was, a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease.

B For that view there is considerable authority.

In the case of *Parker v. Taswell* 2 De G & J 559 an instrument which as containing words of present demise was a lease but which not being under seal was void as such by reason of s. 3 of the Real Property Act 1845, (8 & 9 Vict. c 106) was treated as an agreement for a lease and C specific performance was granted. Lord Chelmsford said (at p. 570):

> If the Legislature had intended to deprive such a document of all efficacies, it would have said that the instrument should be 'void to all intents and purposes'. There are no such words in the Act. I think it would be too strong to say that because it is D void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect.

In the case of *Tidey v. Mollett* [1864], 16 CB (NS) 298, 308 Erle CJ E referring to leases not under seal, said:

> Although at one period the Courts strove to construe these documents to be present demises, yet, since the 8 & 9 Vict c 106, for the same reason, the Judges will, if they contain words of agreement, construe them to be agreements only, and not F demises - *ut res magis valeat quam pereat*.

Again, in the case of *Martin v. Smith* LR 9 Ex 50, 52 the Court was concerned with an instrument not under seal and Kelly CB said:

> *Parker v. Taswell* has decided that such an agreement, though void as a lease, is good and valid as an agreement and may be G enforced in equity by a decree for specific performance.

Later, in the case of *Zimbler v. Abrahams* [1903] 1KB 557 Stirling LJ said (at p.582):

> Having regard, however, to the decision of Lord Chelmsford in H *Parker v. Taswell*, we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance.

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Finally, in the case of *Re Fireproof Doors, Ltd, Umney v. The Company* [1916]2 Ch 142 151 Astbury J applied the same principle to debentures that were invalid as such as not being under seal. He said:

> A lease void at law under the Real Property Act, 1845, s. 3, may be used as an agreement: *Parker v. Taswell*; and I see no reason why an irregular debenture should not be treated in the same way.

Apart from English authority it has been made clear more than once in jurisdictions where the law provides for registration of title to land that the law relating to transfer of land is distinct from the general law of contract.

[20] Court has also taken notice of other cases cited by learned defence counsel to support its contention such as in the case of *P Narayanan s/o Koran v. Pentadbir Tanah Daerah Johor Bahru* [1996] 1 LNS 476 where it was held by the learned judge Abdul Malik Ishak J (as he then was) as follows:

> Now, from the recital of the facts, the plaintiff here purchased the property from Sucha Singh by way of an agreement on November 15, 1970 and under the law though the agreement to deal is ineffective in vesting title or interest, transfer, charge or otherwise deal with the land itself: see *Haji Abdul Rahman v. Mohamed Hassan* (1917) A.C. 209 at page 214-215, especially the speech of Lord Dunedin. It is for this reason that subsection (3) of section 206 of the National Land Code provides that the provisions of the Code requiring dealings to be effected in the manner as prescribed do not "affect the contractual operation of any transaction relating to alienated land or any interest therein". It is germane to refer to the following two cases by way of an analogy - *Margaret Chua v. Ho Swee Kim & Ors* (1961) MLJ 173 and *Siew Soon Wah v. Yong Tong Hong* (1973) 1 MLJ 133 to drive home the point that although unregistered leases are not good as leases, yet they are contract of sale of land just like the present plaintiff here are, if all the requisites of a good and valid agreement are fulfilled, entitled to specific performance of the contract, or in appropriate cases, damages *in lieu* thereof (*Inter-Continental Mining Sdn Bhd v. Societe des Etains de Bayas Tudjuh* (1974) 1 MLJ 145 F.C.

[21] Apart from the circumstances arising from the signing of the lease agreement in this case including the regular payment of rentals by the defendant and accepted by the registered proprietor and its subsequent assigns, this court is also reminded of the undisputed fact where at the initial stage the defendant was required to invest a substantial sum of money to develop the car parking area. According to evidence and facts of this case the expenditure was incurred by the defendant on the expectation that the lease would run for 10 years until 31 May 2009.

[22] It is not disputed that the gist of the terms of the lease agreement *inter alia* are as follows:

> TALA is the registered owner of Plaza Prima;
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> The lease for the parking lots is for the period of 5 years from 1.6.99;
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> The lease can be extended for a further period of 5 years by way of a notice;
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> The base rental paid by the Defendant to TALA is RM8,000.00 per month; and
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> The Lease binds the successors in title and assigns of TALA.

[23] According to the defendant in consideration of his investment on the development of the car park it was agreed as a term of the lease agreement that he be given a lease of the premises for an initial period of five years with an automatic renewal of the lease for another five years at his option by issuing a notice of not less than 30 days before the expiry of the original tenure of the lease. It is not disputed that these were being agreed to in the said agreement between the defendant and TALA.

[24] In the case of *Siew Soon Wah & Ors v. Yong Tong Hong* [1973] 1 LNS 137 cited by learned counsel for the defendant the Privy Council in the course of its judgment had considered as follows:

> In *Inwards v. Baker* [1965] 2 QB 29 a son had built a bungalow on his father's land and had lived in it thereafter in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished. The trustees of his father's will brought proceedings for the possession of the bungalow. In that case Lord Denning MR said at p. 37:
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> > ... in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the Court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the Court will not allow that expectation to be defeated where it would be, inequitable so to do. In this case it is quite plain that the bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, the father could not in 1932 have turned to his son and said: 'You are to

> go. It is my land and my house'. Nor could he at any time thereafter so long as the son wanted it as his home. And Danckwerts LJ said:
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> > ... this is one of those cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection and equity protects him so that an injustice may not be perpetrated.

[25] Considering the facts and circumstances of this case in my opinion though TALA by its agreement had failed to effectively create a registered lease as required by the National Land Code. I do not think its non-registration would render the agreement ineffective. To my mind the agreement between TALA and the defendant had created a valid and a binding contract deserving full recognition in law, and the defendant being the aggrieved party deserves the protection in equity as well.

On The Issue Of Damages

[26] The plaintiff is claiming general damages allegedly for the loss of income he has suffered and also for the loss of profit from the date of completion of the second agreement from 21 May 2004 until the date of vacant possession being delivered to the plaintiff, ie, 31 May 2009. On this claim learned counsel for the plaintiff submitted that as the plaintiff has no access to any of the documents pertaining to the car park business to enable him to make assessment of the actual loss, he has therefore estimated what income a car park business would be able to derive for this court to consider.

[27] On the question of whether the plaintiff has rightly made his claim for loss of income and profit under the head of general damages in *Chong Swee Huat & Anor v. Lim Shian Ghee T/A L & G Consultants & Education Services* [2009] 4 CLJ 113 it was held by the Appeal Court as follows:

> Special damages must be pleaded or proved. Merely pleading special damages without more is unacceptable. Thus the award of special damages of RM980,000.00 must fail. As for the award to the plaintiff the amount of RM50,000.00 for aggravated damages the trial judge had grossly erred in not appreciating the evidence where the defendant had expressly apologized within seven (7) days as requested by the plaintiff. Thus this head of damages should also fail.

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> The learned trial judge also erred in assessing general damages. This he did by computing the loss of income in 1998 and the drop in income at a later date, when there was no evidence to substantiate this. In any case, loss of income is special damages, not general damages (for which the learned judge had already awarded RM980,000.00 separately).

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[28] In *Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor* [2012] 3 CLJ 450 at p. 457 the Court of Appeal referred to cases below and stated as follows:

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> [14] In *Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy* [2005] 2 CLJ 195 Faiza Tamby Chik J referred to *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 LNS 103 and said: I think special damage means 'out-of-pocket expenses' which consists of money incurred or paid by the plaintiff, which amount to a 'loss' to the plaintiff. (citations added)

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> Therefore the test to apply in a claim for special damages would be whether the 1st plaintiff has incurred that expenses or has paid an amount, which is a loss to him.

[29] In *Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan* [2003] 4 CLJ 785; [2004] 1 MLJ 411 which followed Federal Court decision in *Ismail v. Haji Taib* [1972] 1 LNS 185; [1972] 1 MLJ 259 and observed that, 'an aggrieved party had to exercise his option to seek for general damages (loss of profits) or special damages (wasted expenditure or the damages in preparation of the performance of the contract). The party could not recover damages under both heads, though he may plead them in the alternative'.

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[30] As to plaintiff's claim for loss of profit it is also clear from the evidence that for the shortcomings that the plaintiff had encountered and admitted, it was beyond him to prove all his claims from what is contained in the documents belonging to the defendants which the plaintiff could not produce in court. As often quoted I'm again quoting from the case that defence counsel has cited in particular to the words of His Lordship Edgar Joseph Jr. (as he was then) in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 where the learned judge spoke of the general principles governing damages in the following terms: "A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Czarnikow Ltd v. Koufos (The Heron II)* [1969] 1 AC 350).

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Further on His Lordship had added at p. 648, "In this context, I am reminded of Lord Goddard's *dictum* in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 quoted with approval by Thompson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] MLJ 17, namely that:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages'. They have to prove it.

[31] On whether the plaintiff has proven defendant's wrong which has caused the loss in respect of which the plaintiff is claiming general damages it must not be forgotten that the plaintiff has failed to prove the invalidity of the lease agreement and the fact remains that the defendant was paying rentals for occupation of the said premises to TALA and later to TALA's receivers and managers and/or liquidators on behalf of Danaharta Hartanah. As pointed out by learned counsel for the defendant, plaintiff has also not objected to the production of payment vouchers to this court as proof of payments made by the defendant for the abovesaid rentals. As I see it the plaintiff has failed to show to the court the defendant's wrong upon which the plaintiff could rely on as the cause of his loss of profits and the basis of his claim for general damages. I agree with learned counsel for the defendant that the plaintiff bears the burden of proving the fact that it had actually suffered loss of income. It is not sufficient for the plaintiff to claim that because the defendant occupied the premises, it is entitled to damages. The plaintiff must prove on a balance of probabilities that it could have operated a car park business and the income it could have derived.

[32] On the burden of proving damages in *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43 the Federal Court held that: "The respondent, as plaintiff of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in Mayne & McGregor on *Damages* (12th edn.) para. 174".

[33] Apart from that, the law requires the plaintiff to have taken all reasonable steps to mitigate the loss in consequence to the defendant's occupation of the car park. There is no evidence at all to show what

the plaintiff has done to mitigate his losses, if there is any. From the taking over of vacant possession of the premises on 31 May 2009 there is no evidence to show if anything has been done by the plaintiff or at all to operate the car parking business at the said premises.

[34] In *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569 the Supreme Court held at headnote three that:

> [3] The plaintiff was under a duty to take reasonable steps to mitigate its loss immediately upon the breach, ie, buy or sell in the market, if there was an available market or, if there was none, act reasonably to mitigate its loss. The question of what is reasonable in every case is a question of fact & not law …

Decision

[35] On a balance of probabilities this court finds that:

(a) The plaintiff though not the registered owner is the beneficial owner of the premises;

(b) The defendant's continued occupation of the property in question was based on a valid lease agreement;

(c) The plaintiff has failed to prove that he is entitled to damages and he has failed to prove the damages as claimed; and

(d) On a balance of probabilities this court finds that the plaintiff has failed to prove his claim and plaintiff's claim is hereby dismissed with no order as to cost. Each party is to bear its own cost.